

U.S. ARMY

PROCUREMENT POLICY

ALERT BULLETIN

NO. 96-001

February, 29 1996

The enclosed document is forwarded for your information and any necessary implementation in advance of formal publication of a Federal Acquisition Circular (FAC) or Defense Acquisition Circular (DAC). There will be no Department of the Army level supplementation or implementing instructions.

ENCLOSURES:

- 1. USD (A&T) Memorandum, Subject: Small Disadvantaged Business Utilization Program, dated November 3, 1995.**
- 2. Departmental Letter No. 96-001, DP (DAR), Subject: Alternatives to Miller Act Bonds, dated February 1, 1996.**

This bulletin is issued by the U.S. Army Contracting Support Agency. Comments or questions should be referred to the Policy and Procedures Division, SFAE-CSA-PPP, 5109 Leesburg Pike, Suite 916, Falls Church, Virginia, 22041.

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Bulletin 96-002 consists of 11 pages.

Release Approved By: TWC



THE UNDER SECRETARY OF DEFENSE
3010 DEFENSE PENTAGON
WASHINGTON DC 20301-3010



03 NOV 1996

MEMORANDUM FOR SECRETARIES OF THE MILITARY DEPARTMENTS
ATTN: SERVICE ACQUISITION EXECUTIVES
DIRECTORS OF THE DEFENSE AGENCIES

SUBJECT: Small Disadvantaged Business Utilization Program

My memorandum of October 23, 1995 suspended the small disadvantaged business (SDB) set-aside regulations. The suspension does not reflect a lessening of the Department's commitment to the maximum participation of SDBs in our acquisition programs. Rather, the suspension increases the need for extraordinary effort and creativity to maintain and expand the participation of SDBs through the use of other means.

In order to mitigate the adverse impact of the suspension, it is requested that you:

- increase 8 (a) awards, particularly in industries and services where SDBs have not traditionally participated and for firms that have yet to receive an 8 (a) award;
- increase competitive opportunities for SDBs by maximizing use of small business (SB) set-asides;
- re-emphasize the requirement in 10 U.S.C. 2323 (e) (5) (G) that one factor that must be used in evaluating the performance of a contracting officer is the ability of the officer to increase contract awards to SDBs, historically Black colleges and universities, and minority institutions;
- review OMB Circular A-76 policies to potentially increase opportunities for SBs when we contract out activities formerly performed by the government;
- review all acquisitions to determine the feasibility of breaking out requirements to increase opportunities for small and SDBs to successfully compete for price contracts;
- re-emphasize consideration of the extent of small and SDB participation in contract performance during source selections consistent with DFARS 215.605. Strong emphasis should be placed on including the following evaluation criteria:

(1) the extent to which the prime contractor lists in its proposal, by name, the small and SDB concerns on the team and identifies the specific commodity or service the firm(s) will provide.

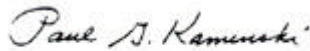
(2) the extent of complexity and variety of work to be performed by small and SDB concerns with greater weight on performance of substantive or high technology components or services. (3) the extent of the participation of small and SDB concerns, evaluated based on

the value of the total acquisition.

(4) past performance in complying with prior proposals and subcontracting plans.

In addition, I am exploring options to expand the pilot mentor protege program or establish a similar alternative program which would include not only SDBs but all small businesses. I would appreciate your input on this, on any similar initiatives you may have and on your best practices under mentor protege initiatives.

I am committed to continuing our fine record of support for the SDB program. I ask for your personal involvement in minimizing the impact of the SDB set-aside suspension and would appreciate learning about your efforts.

A handwritten signature in cursive script that reads "Paul G. Kaminski".

Paul G. Kaminski



THE UNDER SECRETARY OF DEFENSE
3010 DEFENSE PENTAGON
WASHINGTON DC 20301-3010



23 OCT 1996

MEMORANDUM FOR SECRETARIES OF THE MILITARY DEPARTMENTS
ATTN: SERVICE ACQUISITION EXECUTIVES
DIRECTORS OF THE DEFENSE AGENCIES

SUBJECT: Small Disadvantaged Business Utilization Program

Sections 219.501 (S-70), 219.502-2-70, 219.502-4. 219.504 (b) (i), 219.506, 219.508 (e) and 219.508-70, and contract clause 252.219-7002 of the Department of Defense Federal Acquisition Regulation Supplement (DFARS) are hereby suspended. This suspension takes account of the Supreme Court's decision in Adarand Contractors, Inc. v. Pena, 115 S.Ct. 2097 (June 12, 1995).

Until further notice contracting officers shall not set aside acquisitions for small disadvantaged businesses (SDBs). This suspension is effective immediately. Contracting officers should amend solicitations that have been issued to remove a set-aside that was based upon the suspended sections where the amendment of the solicitation will not unduly delay a procurement such that deliveries under the resulting contract would not be received when required. I also waive the requirements of section 22 (a) and (b) of the Office of Federal Procurement Policy Act as amended (42 U.S.C. 418b) because action to take account of the Supreme Court's decision is an urgent and compelling circumstance making compliance with these sections impracticable.

The suspension of the "rule of two" does not reflect any change in the Department's commitment to bringing SDBs into the defense industrial base. The Department has an excellent record of contracting and subcontracting with SDBs and we are committed to maintaining that record.

I expect to announce initiatives in the near future that are designed to limit the adverse impact of this suspension on the SDB community. I have also personally contacted defense industry leaders with the request that industry voluntarily adopt greater subcontracting goals. In the meanwhile, I ask and direct all DoD contracting activities to use their utmost skill and existing authorities to increase awards to SDBs. These efforts should include encouraging small businesses to use SDBs as subcontractors, and encouraging all prime contractors to increase their efforts to award subcontracts to SDBs.

Paul G. Kaminski

Paul G. Kaminski



THE DEPUTY SECRETARY OF DEFENSE
WASHINGTON, D.C. 20301-1000



23 OCT 1996

**MEMORANDUM FOR SECRETARIES OF THE MILITARY DEPARTMENTS
DIRECTORS OF THE DEFENSE AGENCIES**

SUBJECT: Small Disadvantaged Business Contracting Program

The Department has announced suspension of the "rule of two" contracting set-aside program for small disadvantaged businesses (SDBs). This action was taken in consideration of the Supreme Court's recent decision in *Adarand v. Peña* and after consultation with the Justice Department.

I am writing to stress that the suspension of the "rule of two" does not reflect any change in the Department's commitment to bringing SDBs into the defense industrial base. To the contrary, the Department is participating very actively in an intergovernmental working group chaired by the Department of Justice, that is engaged in an expedited review, and where required, reworking of government regulations to ensure that they are fully consistent with the *Adarand* decision. Nonetheless, the suspension will mean some loss of work for some SDBs in the immediate future. Accordingly, I request that you make participation of SDBs in your contracting and subcontracting programs a number one priority and redouble your efforts to achieve and exceed past levels of SDB participation.

I appreciate your aggressive support for these initiatives to ensure that SDBS play an increasingly greater role as defense contractors and subcontractors.



OFFICE OF THE UNDER SECRETARY OF DEFENSE
3000 DEFENSE PENTAGON
WASHINGTON DC 20310-3000



1 FEB 1996

DP (DAR)

IN REPLY REFER TO
DFARS CASE: 95-D305
D.L. 96-001

MEMORANDUM FOR DIRECTORS OF DEFENSE AGENCIES
DEPUTY FOR ACQUISITION AND BUSINESS MANAGEMENT,
ASN (RD&A) /ABM
DEPUTY ASSISTANT SECRETARY OF THE AIR FORCE
(CONTRACTING), SAF/AQC
DIRECTOR, PROCUREMENT POLICY ASA (RD&A) / SARD-PP
DEPUTY DIRECTOR (ACQUISITION), DEFENSE LOGISTICS AGENCY

SUBJECT: Alternatives to Miller Act Bonds

We have amended the Defense Federal Acquisition Regulation Supplement (DFARS) to revise the interim rule which was issued on August 31, 1995, as Departmental Letter 95-018, providing alternative payment protections for construction contracts between \$25,000 and \$100,000, pending implementation of Section 4104 (b) (2) of the Federal Acquisition Streamlining Act of 1994 in the Federal Acquisition Regulation.

This revised interim DFARS rule is effective immediately and will be included in a future Defense Acquisition Circular.

Eleanor R. Spector
Director, Defense Procurement

Attachment

cc: DSMC, Ft. Belvoir

**DFARS Case 95-D305, Alternative to Miller Act Bonds
Revised Interim Rule**

PART 228 -- BONDS AND INSURANCE

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228.171 Alternative payment protections in construction contracts between \$25,000 and \$100,000.

228.171-1 General.

[(a)] For construction contracts greater than \$25,000, but not greater than \$100,000, the contracting officer shall select one [two] or more of the following payment protections [, **giving particular consideration to inclusion of an irrevocable letter of credit as one of the selected alternatives:**] ~~which the contractor may submit to the Government for the protection of suppliers of labor and material.~~

(~~a~~[1]) A payment bond.

(~~b~~[2]) An irrevocable letter of credit.

(~~c~~[3]) A tripartite escrow agreement. The prime contractor establishes an escrow account in a Federally insured financial institution and enters into a tripartite escrow agreement with the financial institution, as escrow agent, and all of the suppliers of labor and material. The escrow agreement shall establish the terms of payment under the contract and of resolution of disputes among the parties. The Government makes payments to the contractor's escrow account, and the escrow agent distributes the payments in accordance with the agreement, or triggers the disputes resolution procedures if required.

(~~d~~[4]) Certificates of Deposit. The contractor deposits certificates of deposit [**from a federally insured financial institution**] with the contracting officer, in an acceptable form, executable by the contracting officer, ~~and immediately refundable in an amount equal to the penal amount of the payment bond waived.~~

(~~e~~[5]) A deposit of the types of security listed in [**FAR**] 28.204.

[(b) The contractor shall submit to the Government one of the payment protections selected by the contracting officer.]

228.171-2 Amount required.

1. The requirements at FAR 28 102-2 (b), for the amount of payment bonds, also apply to the alternative payment protections described in 228.171-1. ~~In addition, the payment protection must provide protection for the full contract performance period plus one year, and must authorize the contracting officer to immediately access funds at any time within the contracting officer's discretion.~~

(b) The requirements at FAR 28.102-2(c), for the penal sum of bonds for requirements and indefinite-quantity contracts, also apply to the alternative payment protections described in 228.171-1.

228.171-3 Contract clause.

Use the clause at 252.228-7007, Alternative Payment Protections, in solicitations and contracts for construction, when the estimated or actual value exceeds \$25,000 but does not exceed \$100,000. Complete the clause by specifying the payment ~~protection or~~ protections selected (see 228.171-1 [(a)]), the penal amount required, and the deadline for submission.

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PART 252 -- SOLICITATION PROVISIONS AND CONTRACT CLAUSES

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SUBPART 252.2 -- TEXTS OF PROVISIONS AND CLAUSES

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252.228-7007 Alternative Payment Protections.

As prescribed in 228.171-3, use the following clause:

ALTERNATIVE PAYMENT PROTECTIONS (~~AUG 1995~~ [FEB 1996])

(a) The Contractor shall submit one of the following payment protections:

(b) The penal sum of the payment protection shall be in the amount of \$_____.

(c) The submission of the payment protection is required by _____.

(d) The payment protection shall provide protection for the full contract performance period plus a one-year period, ~~and shall authorize the Contracting Officer to immediately access funds at any time and withhold funds pending resolution by administrative or judicial proceedings or mutual agreement of the parties, except for escrow agreements which provide for a disputes resolution procedure.~~

(e) Except for escrow agreements [**and payment bonds,**] which provide their own protection procedures, the Contracting Officer is authorized to access funds under the payment protection when it has been alleged in writing by a supplier of labor or material that a nonpayment has occurred [, **and to withhold funds pending resolution by administrative or judicial proceedings or mutual agreement of the parties**].

(f) When a tripartite escrow agreement is used, the Contractor shall utilize only suppliers of labor and material who signed the escrow agreement.

(End of clause)